BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public)	Application No. NUSF-40/PI-86
Service Commission, on its own motion)	
To determine the extent to which Voice)	
er Internet Protocol services should)	
Be subject to Nebraska Universal)	
Service Fund requirements.)	

COMMENTS OF THE RURAL INDEPENDENT COMPANIES

I. Introduction

The Rural Independent Companies (the "Companies") hereby submit the following Comments in the above-referenced docket. The Companies appreciate the opportunity to submit comments in this matter responsive to the August 24, 2004 Order (the "Order") of the Nebraska Public Service Commission (the "Commission") and the subsequent Order entered on September 23, 2004, extending the deadline for comments to November 1, 2004.

The Order initiates an investigation to determine the extent to which Voice over Internet Protocol ("VoIP") services should be subject to Nebraska Universal Service Fund ("NUSF") contribution requirements, and solicits comments on a number of specific questions regarding the proper relationship of VoIP service providers to the NUSF. Following a survey of proceedings in this and other jurisdictions relating to VoIP, the Companies, in these Comments, will identify and address the central regulatory issues relevant to such relationship. The Companies also will demonstrate that the "IP Transmission Services" portions of all VoIP services are properly classified as "telecommunications services" as such term is defined in the Telecommunications Act of 1996 (the "Act"), and that a portion of such IP Transmission Services can be properly

identified as intrastate telecommunications services. To the extent that providers of VoIP services are offering intrastate telecommunications services, such service providers are subject to NUSF contribution requirements.

The Companies also believe that, because of the increasingly important functions the Internet performs in today's society, regulators at both the state and federal levels should recognize the Internet's crucial role as a social infrastructure resource, and as a consequence thereof should exercise appropriate regulatory authority with respect to a variety of Internet-related issues. The Companies believe that broadband Internet access is likely to eventually replace the analog local loop and dial tone as fundamental elements of universal service, and that the Commission should adopt policies that ensure the NUSF will continue to support the underlying facility infrastructure in rural and high cost areas of Nebraska.¹

II. Background

A. Prior Nebraska Commission Proceedings

(i) Application C-1825/PI-21

The instant docket is not this Commission's first examination of the extent to which VoIP services should be subject to NUSF contribution requirements. In Application No. C-1825/PI-21 the Commission opened an investigation into various aspects of Internet protocol ("IP") telephony. The Commission closed Application No. C-1825/PI-21 with the following statement:

¹The Companies note that on October 20, 2004, Jeffrey Carlisle, Chief of the FCC's Wireline Competition Bureau, stated during a "Town Hall Meeting" that a decision concerning the scope of the FCC's jurisdiction over VoIP would be issued by the FCC in the near future. However, whether such matter would be on the FCC's November 9 agenda was described as a matter "that's really up to the Chairman's office." Quite obviously, any order issued by the FCC relative to the jurisdictional issue will directly bear upon this Docket. The Companies reserve the opportunity to supplement these Comments in response to any order issued by the FCC regarding jurisdiction.

All users of the network should be treated equally, based on the costs they impose on the network. Aliant suggested that "Instead of burdening ISPs with current access charges, the (Commission) should facilitate the creation of an environment in which all network users contribute equitably to the cost of the network." The Commission has a vehicle in which the preliminary steps toward such an environment can be taken. Docket No. C-1628 was initiated by the Commission's own motion to address access charge reform and the development of a state universal service fund. The specific questions concerning an IP provider's obligations for access and universal service should be addressed in that docket.

(ii) Application C-1628

In Application No. C-1628, one of the inquiries on which the Commission requested comment was:

8. Should service providers using Internet protocol contribute to universal service? If so, does the Commission have the authority to require them to do so? How will these providers be identified?

Various parties commented in response to the inquiry. All of such commenters, except MCI, favored contribution by IP telephony providers to universal service.

US West stated:

IP telephony calls are an example of telecommunications services which are being provisioned using Internet protocol. During an IP telephony call, the analog signal is temporarily converted into IP packets for routing purposes only. While an IP telephony call may traverse either the intrastate or interstate jurisdictions over a packet switched network, the call is initiated and terminated on the public switched network. In this manner, a telecommunications service provider is using Internet protocol, but merely for routing purposes, in the provisioning of a toll call. Because this provider is using the public switched network to provision a telecommunications service, it should be required to contribute to the state universal service fund, as stated by this Commission.²

United Telephone Company of the West d/b/a Sprint presented testimony of Brad A.

Gasper stating:

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² See, Comments of US West Communications, Inc. filed in Application C-1628 Responding to the Commission's October 2, 1998 Order, p. 4.

To the extent that a service provider is providing an intrastate telecommunications service, even if the service provider is using internet protocol to provide the service, that service provider should contribute to universal service. The provider's assessment should be based on their intrastate telecommunications service revenue.

Sprint believes that the Commission does have the authority to require such service providers to contribute to the NUSF. Section 254 (f) of the Act authorizes the Commission to require that all telecommunications carriers providing intrastate telecommunications services contribute to the preservation and advancement of universal service.³

AT&T Communications of the Midwest, Inc. stated in its comments:

At a minimum (and regardless of whether Internet access is supported by the USF), competitive neutrality and the broad contribution base necessary to support universal service require that, to the extent that an Internet provider offers both telecommunications and information services, the telecommunications services portion must be assessed USF support obligations (as well as cost-based access charges). While the FCC has appropriately distinguished between the "information service" and the "telecommunications service" offerings of a provider, the FCC has required *all* providers, including Internet service providers ("ISPs") and enhanced service providers ("ESPs"), to contribute to the USF to the extent that they provide telecommunications service and has exempted only their information service offerings from USF contribution obligations.⁴

Aliant Communications Co. stated in its comments:

Philosophically, Aliant strongly believes that providers using Internet protocol should be required to contribute to the universal service fund. The Commission has, however, identified two major obstacles, namely, jurisdiction and identification. . . . Aliant recognizes that enforcement of these requirements will be difficult. However, the alternative is to allow free use of the public switched network by Internet providers while not collecting support for such use. This result is unacceptable.⁵

A group of rural ILECs stated in their comments:

³ See, Direct Testimony of Brad A. Gasper filed in Application C-1628 dated October 20, 1998, p. 10.

⁴ See, Comments of AT&T Communications of the Midwest, Inc. filed in Application C-1628, p. 8 (footnotes omitted, emphasis in original).

⁵ See, Comments of Aliant Communications Co. filed in Application C-1628, p. 7.

Because ISPs that offer telecommunications services should be required to pay for and support the network that they utilize to provide those services, the Independents also contend that ISPs that offer telecommunications service must be required to contribute to a state universal service fund on the same basis as other telecommunications service providers. In order to ensure that state universal service goals are met, the Commission must prevent Internet telephony from becoming a means for ISPs to avoid supporting the very telecommunications infrastructure that allows them to provide their services. ISPs, like all telecommunications providers, should have to share in the commitment to maintain universal service in Nebraska.⁶

After consideration of all comments, in its Findings and Conclusions in Application C-1628, the Commission concluded:

The surcharge will be assessed on all interstate and intrastate telecommunication services regardless of the underlying technology used in the provisioning of these services. (emphasis added)⁷

The foregoing conclusion represents the current state of Nebraska law and current Commission policy that forms the backdrop for the Commission's investigation in this proceeding.

(iii) Application C-3228

Currently, the Commission is considering the evidence and legal arguments submitted by the parties in VoIP-related Application C-3228. Such docket concerns Time Warner's application for a certificate of authority as a competitive local exchange carrier using VoIP as a technology platform for its Digital Phone service. In its testimony in such application, Time Warner has voluntarily agreed to collect and remit the NUSF surcharge on a portion of the revenues derived from the sale of its bundled

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⁶ See, Comments of Arapahoe Telephone Company, et al. filed in Application C-1628, p. 10.

⁷ By Order entered in Application C-1628 on February 2, 1999, the Commission held that the NUSF surcharge should be assessed only on retail *intrastate* telecommunications services revenues and not on interstate revenues.

telecommunications services. Time Warner will remit NUSF surcharges based on a revenue allocation of 28.5% interstate and 71.5% intrastate. Time Warner's representative stated at the hearing on the application that Time Warner would continue to remit NUSF surcharges until such time that there is a change in current law. The Time Warner application is currently pending before the Commission.

(iv) Application C-3201

The Commission has recently conducted a hearing regarding the CLEC application of Qwest Communications Corporation ("QCC") in Application C-3201. QCC is an affiliate of Qwest Corporation ("QC"), an ILEC in the state of Nebraska. This docket concerns QCC's application for a certificate of authority as a competitive local exchange carrier in the entire state of Nebraska. This application is related to this NUSF docket because the QCC witness testified that QCC currently provides a VoIP-based service and plans on providing VoIP-based service to customers throughout Nebraska. Such witness specifically stated that QCC will not collect or remit the NUSF surcharge on its VoIP-based service. This position of QCC could have material adverse consequences on the stability of the NUSF. Parties to the QCC application are currently awaiting availability of the transcript of the hearing, and thereafter will write post-hearing briefs.

B. Survey of Relevant Actions in Other Jurisdictions

The question whether VoIP is properly classified as "information service" or "telecommunications service" as such terms are defined in the Act is, to say the least, controversial. Federal and state regulators and courts have taken a variety of approaches to classifying VoIP services, and have reached differing conclusions.

⁸ See, Application C-3228 Transcript of Hearing 12:7-12 and Exhibit 5, Response to Data Request No. 4.

(i) FCC Activity

The Federal Communications Commission ("FCC") continues to show its reluctance to exercise regulatory oversight over Internet-related services, and has, over the past year, acted on VoIP issues by conducting a VoIP forum, by issuing two Orders on subjects that may be viewed as polar opposites in the spectrum of VoIP services, and has, over on subjects that may be viewed as polar opposites in the spectrum of VoIP services, and has, over on subjects that may be viewed as polar opposites in the spectrum of VoIP services, and has, over on subjects that may be viewed as polar opposites in the spectrum of VoIP services, and has, over on subjects that may be viewed as polar opposites in the spectrum of VoIP services, and has, over on subjects that may be viewed as polar opposites in the spectrum of VoIP services.

The FCC's two recent VoIP Orders were issued in response to petitions for declaratory ruling submitted by pulver.com ("Pulver") and AT&T.

Pulver Decision

Pulver requested that the FCC declare its Free World Dialup ("FWD") offering to be neither a "telecommunications service" nor "telecommunications" as those terms are defined in the Act. The FCC's description of FWD, as stated in the Pulver Decision granting Pulver's petition, is as follows.

Through FWD, Pulver offers users of broadband Internet access services the opportunity to join other such users in becoming *members* of the FWD community in order to *communicate directly with one another* over the Internet. (emphasis added)¹²

⁹ Public VoIP Forum held by FCC, December 1, 2003; see http://www.fcc.gov/voip/voipforum.html.

¹⁰ In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004) ("Pulver Decision"), in which the FCC determined that the Free World Dialup service offered by Pulver is an interstate information service. In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, Order, FCC 04-97 (rel. April 4, 2004) ("AT&T Decision"), in which the FCC determined that AT&T's VoIP service is little more than a substitute for its traditional IXC services and should not be exempt from access charges.

¹¹ *IP-Enabled Services*, WC Docket 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. March 10, 2004) ("IP NPRM").

¹² See, Pulver Decision, para. 2.

[T]he term "members"... refer[s] to those Internet users that have joined the FWD community by: registering with FWD; obtaining an FWD identifying number; acquiring and configuring customer premises equipment (CPE) to enable peer-to-peer communications via broadband Internet access; and making such communications entirely over the Internet to other users that have similarly joined FWD, facilitated by information obtained from FWD in order to do so. (emphasis added) ¹³

While the FCC may characterize FWD as an Internet application that "merely facilitates peer-to-peer communication," the Companies emphasize that "telecommunications" does indeed occur when two FWD members use the service to establish a VoIP connection between them, and that Pulver itself plays a role, albeit a minor role, in establishing that connection. In the main, the "telecommunications" that occurs in the FWD scenario is not provided by Pulver. It is provided to the two FWD members by their respective ISPs. In any event, the relatively minor telecommunications-related functions Pulver does perform (i.e. network address resolution and session setup) cannot be a "telecommunications service," as Pulver offers its FWD service free of charge, rather than on a fee basis to the public, as is required in the statutory definition of "telecommunications service." The Companies note that the FCC limited the scope of the Pulver Decision to the FWD service alone, declining to address broader issues. In

¹³ Id., footnote 2.

¹⁴ Id., para. 12.

¹⁵ Ex Parte communication of pulver.com, Jan. 15, 2004; available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native or pdf=pdf&id document=6515683048.

¹⁶ See part III. A. below, definition of "telecommunications service."

¹⁷ See, Pulver Decision, footnote 3.

AT&T Decision

In its petition, AT&T requested that the FCC declare its VoIP service to be exempt from access charges applicable to interexchange circuit-switched calls. AT&T's VoIP service is very different from Pulver's. As summarized by the FCC,

The service at issue in AT&T's petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls – by an end user who dials 1 + the called number from a regular telephone. When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines. ¹⁸ (footnotes omitted)

Noting that users of AT&T's VoIP service "obtain only voice transmission with no net protocol conversion" and "receive no enhanced functionality by using the service," the FCC denied AT&T's petition, finding the service to be a telecommunications service subject to section 69.5(b) of the FCC's rules.

IP NPRM

On March 10, 2004, the FCC released the IP NPRM for the purpose of examining issues relating to services and applications making use of IP (collectively, "IP-enabled services"), including but not limited to VoIP services. In the IP NPRM, the FCC sought comment regarding the effect of potential migration to IP-enabled services on the FCC's statutory obligation to support and advance universal service. In addition, the FCC sought comment regarding the appropriate basis for asserting federal jurisdiction over

²⁰ Id., para. 15.

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¹⁸ See, AT&T Decision, para. 1.

¹⁹ Id., para. 12.

²¹ See, IP NPRM, para. 66.

various categories of IP-enabled services,²² and asked commenters to describe which particular regulatory requirements, if any, should apply to each category of IP-enabled services.²³ Parties filed comments in the IP NPRM on May 28, 2004, with reply comments being filed on July 14, 2004.²⁴ No decisions have been released by the FCC regarding those issues examined in the IP NPRM.

(ii) Court Proceedings

There are four court proceedings that are especially relevant to the Commission's investigation regarding VoIP and universal service. Although these cases are not directly on point, the cases do provide an understanding of the current status of legal proceedings regarding regulation of VoIP and Internet-related services. These cases are as follows.

Vonage v. Minnesota PUC, 290 F. Supp.2d 993 (D. MN 2003).

In this case the court held that Vonage's VoIP service was an "information service" rather than a "telecommunications service" under the Telecommunications Act, and thus, the Minnesota Commission was precluded from regulating Vonage. In summary, the court stated that:

[I]t is clear that Congress has distinguished telecommunications services from information services. The purpose of Title II is to regulate telecommunications services, and Congress has clearly stated that it does not intend to regulate the Internet and information services. Vonage's services do not constitute a telecommunications service. It only uses telecommunications, and does not provide them.

²³ Id., para. 48.

²² Id., para. 40.

²⁴ See, the Comments and Reply Comments sponsored by a majority of the Companies, copies of which are attached hereto as Appendices A and B.

290 F. Supp. at 1003.²⁵ This case is currently pending on appeal before the Eighth Circuit Court of Appeals.²⁶

<u>Vonage v. New York State PSC</u>, 2004. (Unreported Decision, copy attached as Appendix C)

In this proceeding the federal district court for the Southern District of New York issued an injunction against the New York State Public Service Commission preventing the Commission from exercising jurisdiction over Vonage. The injunction was based upon Vonage's demonstration that it was likely to succeed on the merits of its claim that regulation of Vonage's VoIP service by the New York Commission was preempted by federal law. This case is pending before the court and a status conference has been set for December 13, 2004.

AT&T v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

This case arose out of the merger between AT&T and TCI, a cable operator holding franchise agreements with the City of Portland and Multnomah County in the state of Oregon. Concerned that AT&T, after acquiring TCI, might seek to exclude competing ISPs from the market by restricting cable broadband access to its own proprietary ISP, the local franchising boards sought to condition the merger upon AT&T's offering competing ISPs open access to its cable broadband network. AT&T

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²⁵ The Companies note that the district court's basis for its claim that "Congress has clearly stated that it does not intend to regulate the Internet" is a section of U. S. Code entitled "*Protection for private blocking and screening of offensive material*" which is entirely concerned with Internet *content*, not economic regulation. *See* 47 U.S.C. § 230. This law is the source of the commonly cited statement: "It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b).

²⁶ This case is pending before the Eighth Circuit as *Vonage Holdings Corporation et. al. v. The Minnesota Public Utilities Commission et.al.*, Case No. 04-1434, and is scheduled for oral argument November 17, 2004.

filed suit claiming that the franchising boards lacked authority to impose such a condition. The Oregon Federal district court granted summary judgment to the City of Portland²⁷ and AT&T appealed to the Ninth Circuit Court of Appeals.

In its decision, the Ninth Circuit found that AT&T's cable broadband service consists of two elements: a transmission "pipeline" and the Internet access service transmitted through that pipeline - the former being a telecommunications service, the latter an information service. The court held that the Act prohibits a franchising authority from regulating cable broadband Internet access, and reversed the district court's summary judgment.²⁸

FCC v. Brand X Internet Services, 345 F.3d 1120 (9th Cir 2003).

This significant federal circuit court of appeals decision concerns the regulatory classification of a specific type of broadband Internet access service. In this case the Ninth Circuit reversed an FCC decision that classified Internet service provided by cable modem as exclusively an interstate information service. The Ninth Circuit found that cable modem service was part "telecommunications service" and part "information service."

The *Brand X* decision is important because the court analyzed the distinction between a telecommunication service and an information service, and found that a service provided to a customer may be a combination of both types of services. Petitions for writ of certiorari are currently pending before U.S. Supreme Court with regard to the

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²⁷ AT & T Corp. v. City of Portland, 43 F.Supp.2d 1146 (D.Or. 1999).

²⁸ 216 F.3d at 880.

Brand X case.²⁹

III. Regulatory Issues Relevant to the Current Proceeding

In this investigation, regulatory and judicial actions in other jurisdictions provide only limited guidance in defining the proper relationship between providers of VoIP services and the NUSF. The Companies urge the Commission to principally rely upon federal and state statutes to identify the central questions, the answers to which will assist the Commission in the adoption of regulatory policy that comports with the law. At the federal level, the key statutory question is the extent to which providers of VoIP services are telecommunications carriers engaged in providing intrastate telecommunications services.³⁰ The pivotal Nebraska statutory issues are (1) the extent to which VoIP services are telecommunications services and (2) the extent to which the provision of VoIP services constitutes intrastate commerce.³¹ Clearly, in both federal and state law, two questions are paramount: (a) Does VoIP service constitute or include a

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²⁹ There are three writs of certiorari that have been filed with the United States Supreme Court regarding the *Brand X* case:.

⁽¹⁾ No. 04-277, National Cable & Telecommunications Association, et al., Petitioners v. Brand X Internet Services, et al., Docketed August 31, 2004.

⁽²⁾ No. 04-281, Federal Communications Commission and United States, Petitioners v. Brand X Internet Services, et al., Docketed August 31, 2004.

⁽³⁾ No. 04-460, National League of Cities, et al., Petitioners v. Federal Communications Commission, et al., Docketed October 5, 2004.

³⁰ Currently, federal law provides that telecommunication carriers support universal service. Federal law states that "[e]very telecommunications carrier that provides intrastate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." 47 USC §254(f).

³¹ Neb. Rev. Stat. § 86-323 states, in pertinent part, "The Legislature declares that it is the policy of the state to preserve and advance universal service based on the following principles: (4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service. (5) Funds for the support of high-cost service areas will be available only to the designated eligible telecommunications companies providing service to such areas."

Neb. Rev. Stat. § 86-322 defines a telecommunications company as "any natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of

telecommunications service?; and, if VoIP does constitute or include a telecommunications service, (b) Can a portion of VoIP service be properly identified as intrastate? Furthermore, because of the wide variety of VoIP services available, and because of the multiple service providers that may be involved in the delivery of VoIP services to the end user, care must be taken when identifying the portion or portions of a VoIP service that may constitute an intrastate telecommunications service. Finally, in this section the Companies review the legal authority for the Commission to assess the NUSF surcharge on VoIP services.

A. Does VoIP service include a Telecommunications Service component?

When presented with Internet-related service issues, regulators and courts have tended to classify the service in question as either a "telecommunications service" or an "information service," the two being mutually exclusive categories of service as defined by the Act.

In 47 U.S.C. §157 (46), "telecommunications service" is defined as:

... the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

In 47 U.S.C. §157 (43) "telecommunications" is defined as:

... the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier from the commission."

Furthermore, Neb. Rev. Stat. §86-324(2)(d) provides: Notwithstanding the provisions of section 86-124, in addition to other provisions of the act, and to the extent not prohibited by federal law, the commission: (d) *Shall require every telecommunications company to contribute* to any universal service mechanism established by the commission pursuant to state law. (emphasis added.)

In contrast, 47 U.S.C. §157(20) defines "information service" as:

... the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Nebraska's telecommunications statutes contain a definition of telecommunications that is very similar to the federal definition. Neb. Rev. Stat. §86-117 (Cum. Supp. 2002) defines "telecommunications" as:

... the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received.

Specifically, telecommunications is the *transmission* of information. On the other hand, information service concerns the *use or manipulation* of information via telecommunications. Telecommunications service provides *information transmission for a fee*.

The concurring opinion of Judge Thomas in the Brand X case underscores the clarity and usefulness of these definitions.

In *City of Portland*, we . . . concluded that Congress meant what it said in defining 'telecommunications.' We did not discern any ambiguity in the statutory meaning for the agency [FCC] to interpret.³²

The Companies believe that a careful reading of the relevant statutes leads to the inevitable conclusion that *every* VoIP service requires and involves the provision of telecommunications service to end users because, whatever additional features may be bundled with the service, the essential, characteristic behavior of *all* VoIP services is:

- *information of the users' choosing* (i.e. voice frequency audio)
- *is being transmitted* (perhaps over the Internet, perhaps over a private IP network, perhaps also over the PSTN)

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³²345 F.3d at 1135.

- between or among points specified by the user (perhaps using a traditional telephone number, perhaps using a "member-ID"),
- without change in the form or content of the information as sent and received (the whole point of the exercise is to deliver the sound as originally spoken).³³

This behavior, according to Congress and the Nebraska Legislature, defines "telecommunications," and is characteristic not only of VoIP sessions, but can be easily generalized to include the vast majority of information exchanges occurring via the Internet today (i.e., end user information, not network management information). Every web page viewed, every email sent involves telecommunications, as defined in the Act and in Nebraska statutes. While the Companies recognize that this position stands in stark contrast to the views expressed by some regulators, some judges and some in the industry, the Companies believe that, absent Congressional action directing to the contrary, public policy must be aligned with the plain language of the Act. Regulators must eventually recognize that any use of the Internet by end users, for which a fee is paid by one or more parties for such use, involves the provision of a telecommunications service, irrespective of the possible simultaneous provision of an information service.

In their reply comments in the FCC's IP NPRM docket, ³⁴ the Nebraska Rural Independent Companies divided IP-enabled services into two categories - IP Transmission Services and IP-Enabled Applications, 35 identifying IP Transmission Services as telecommunications services and identifying IP-Enabled Applications as

³³ See, 47 U.S.C. §157 (43) and Neb. Rev. Stat. §86-117 (Cum. Supp. 2002).

³⁴ See, Appendix B.

³⁵ IP-Enabled Applications are a class of applications that are typically resident on general-purpose host or server computers and rely on IP Transmission Services to exchange information over distance. IP Transmission Services are network transmission functions, provided for a fee, that utilize IP and related protocols that are classified to layers 1-5 of the OSI Reference Model and include the functions provided by the underlying physical medium.

information services - and using the "layers" of protocol functions defined by the Open Systems Interconnection model to locate the boundary between them.³⁶ Others have proposed a layered approach in which four "layers" are defined: physical medium, protocol or code, application and content. In this scheme, "telecommunications" involves the physical medium and protocol layers, while "information" is concerned with the application and content layers.³⁷ The Companies urge the Commission to adopt a "layered" approach as a long-term strategy in its development of policies with respect to IP-enabled services.

B. Can a portion of VoIP service be properly identified as intrastate?

The Companies urge the Commission to look beyond the rhetoric of those who claim that geography has no meaning on the Internet.³⁸ Such statements ignore the fact that the Internet protocol is, first and foremost, an *end-to-end* addressing scheme designed expressly for the purpose of exchanging data between two parties,³⁹ where each party's CPE knows the Internet address of the other, and where both addresses are present in every data packet sent between them. Internet addresses are well-defined.

³⁶ In this approach, IP Transmission Services include the physical medium and the functions of all OSI protocol layers from 1 (physical layer) through 5 (session layer).

³⁷ See, Arizona Corporation Commission Comments, WC Docket No. 04-36 at page 8; Consumer Federation of America Comments, WC Docket No. 04-36 at pages 23-30; and Vermont Public Service Board Comments, WC Docket No. 04-36 at page 11.

³⁸ See, e.g., Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper, March, 1997 at p. 2, 47-48. This paper is cited in support of the following fanciful statement by the FCC. "An Internet communications does not necessarily have a point of "termination" in the traditional sense. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various state or foreign countries ..." In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, rel. October 30, 1998, at para. 22.

³⁹ Robert Cannon, "Will the Real Internet Please Stand Up: An Attorney's Quest to Define the Internet" (March 2004) at page 8-9, 20-25. Telecommunications Policy Research Conference 2002. http://ssru.com/abstract=516603.

Every assigned address is unambiguously associated with a specific piece of electronic equipment, which necessarily resides in a particular geographical location.

The only ambiguities in associating an Internet address with the exact physical location of a device occur either when the device is using wireless Internet access or the device utilizes Dynamic Host Configuration Protocol ("DHCP") to obtain an Internet address from a pool of addresses kept by a DHCP server. Yet even in those cases, the uncertainty might only very rarely rise to a level that would preclude the association of an Internet address with the state in which the equipment is located.

The Companies believe that the end points of all types of Internet traffic, particularly including VoIP traffic, can be reasonably associated with a geographic location, and that all types of Internet traffic can be reasonably identified as interstate or intrastate. The Act provides the following definition of *interstate* communications:

The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States. . .or the District of Columbia, to any other State, Territory, or possession of the United States. . .but shall not, with respect to the provisions of title II of this Act. . .include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State Commission. ⁴⁰

The Companies' position is that not only can a portion of VoIP service be identified as intrastate in nature, but further that the Act requires such classification of VoIP communications between end points within a state.

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⁴⁰ 47 U.S.C. § 153(22).

C. What portions of VoIP services constitute an intrastate telecommunications service?

As noted above, the Companies believe that VoIP service clearly fits the Act's definition of a telecommunications service. However, because the use of VoIP service often involves multiple entities, each providing its own portion of the end-to-end transmission utilized by the end users, it is important to properly identify which parties are actually providing a telecommunications service, and which may be providing only an information service. Moreover, because different VoIP providers offer widely differing VoIP services, one must take care when generalizing from one instance to another.

In addition to the Pulver and AT&T VoIP services briefly described above, Vonage Holdings, Corp. ("Vonage"), Time Warner and QCC provide further examples of distinct varieties of VoIP service.

Vonage's VoIP service is offered through the establishment and use of multiple gateways between the Internet and the PSTN, facilitating hybrid VoIP/PSTN sessions between one end user with broadband Internet access and another end user with traditional telephone service. At the gateway locations, Vonage purchases line service (appearing to the PSTN as an end user) and purchases broadband Internet access (appearing to the Internet also as an end user). In delivering such a hybrid session to its customer, Vonage uses resources of both networks to establish end-to-end connectivity, and bills its customer (at the broadband-Internet end) a flat fee for the capability of doing so. A hybrid session of the Vonage type involves at least four other telecommunications service providers besides the principal intermediary, Vonage, namely: (1) an ISP at one end user location, (2) a local exchange carrier at the other end user location, (3) the ISP

serving Vonage at its gateway location, and (4) the local exchange carrier serving Vonage at its gateway location. In its advertising materials, Vonage calls itself "The Broadband Phone Company."

Time Warner's Digital Phone service is similar in some respects to Vonage's VoIP service, but differs in several important ways. Time Warner owns the physical medium over which its VoIP service is provided, also providing video cable service and cable modem service over the same local distribution network. Time Warner's VoIP service utilizes an internal IP network specifically engineered for VoIP traffic and does not use the Internet. As with Vonage, Time Warner utilizes PSTN gateways to facilitate hybrid VoIP/PSTN sessions between Digital Phone customers and end users with traditional telephone service. Such a Digital Phone hybrid session would again involve essentially the same number of telecommunications functions being performed as in the Vonage case, but because it does not use the Internet, there are, technically speaking, no ISPs involved. Furthermore, Time Warner relies on a local exchange carrier at each gateway location - through a "partner" relationship - to provide both the intermediary gateway function that Vonage performs and the function performed by the provider numbered (4) in the Vonage example above.

QCC's VoIP offering, based upon their witness' description at the C-3201 application hearing (see above), appears to be similar to Time Warner's VoIP service, but differs in several important ways. Both QCC and Time Warner own the physical medium over which its VoIP service is provided, however, QCC provides DSL or another high-speed Internet service over the local distribution network and does not currently provide a cable television service. Both Time Warner and QCC appear to

utilize an internal IP network engineered for VoIP traffic. Although Time Warner plans to utilize a CLEC partner to facilitate calls to the PSTN, QCC will perform all connections with the PSTN using its own or an affiliated company's facilities.

As noted above, the Companies believe that Pulver provides members of the FWD community a relatively minor telecommunications function that cannot be a telecommunications service because it is offered free of charge.

AT&T's VoIP service, as described above, is clearly a telecommunications service. Because it involves the PSTN at both the originating and terminating end points, service jurisdiction is determined in the same manner as for traditional interexchange telecommunications service. AT&T is the retail telecommunications service provider to the originating end user. No retail service is provided to either end user by their respective local exchange carriers. AT&T must purchase exchange access from both end users' local exchange carriers to complete the call.

Vonage, Time Warner and QCC present more complex cases. For a hybrid VoIP/PSTN session, which all three companies support, the Companies believe that the geographic location of the end users should determine the jurisdictional nature of the call. For hybrid calls originating on Time Warner's (or QCC's) VoIP network, Time Warner (or QCC) is providing the retail telecommunications service to the end user. For such calls originated by a Vonage subscriber, both Vonage and the originating end user's ISP provide a retail telecommunications service. For hybrid calls originating on the PSTN destined for a Time Warner (or QCC) VoIP customer, retail telecommunications service is provided to the originator by his or her LEC (for a local call) or interexchange carrier (for a toll call) and is provided to the called party by Time Warner (or QCC). For such

calls destined for a Vonage customer, retail telecommunications service is provided to the originator by his or her LEC or interexchange carrier and is provided to the called party by Vonage and by his or her ISP. In all cases described here, if the call is jurisdictionally intrastate, all retail service providers are providing an intrastate service.

D. What is the extent of the Commission's assessment authority?

The Commission's authority to assess revenues related to VoIP or other IP

Transmission Services is governed by state and federal law. The Act provides that "a

State may adopt regulations not inconsistent with [FCC] rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and non-discriminatory basis, in a manner determined by the State, to the preservation and advancement of universal service in that State."

The Nebraska Universal Service Fund Act states: "All providers of telecommunications services should make an equitable and non-discriminatory contribution to the preservation and advancement of universal service." Additionally, the Nebraska statute provides that the NPSC "shall require every telecommunications company to contribute to any universal service mechanism established by the commission pursuant to state law." Neb. Rev. Stat. §86-324(2)(d).

As noted above, the FCC, in its IP NPRM, is considering whether it should exercise federal jurisdictional authority over various IP-enabled services, including VoIP. Even if the FCC were to find that such services should only be regulated at the federal

⁴¹ 47 U.S.C. § 254(f).

⁴² Neb. Rev. Stat. 86-323(4).

level, this finding would not affect the authority of the NUSF to levy a surcharge on intrastate telecommunications revenues. In *Texas Office of Public Utility Counsel v.*FCC, 183 F.3d 393 (5th Cir. 1999) ("TOPUC") the United States Court of Appeals for the Fifth Circuit found that states have the authority to levy a universal service surcharge on Commercial Mobile Radio Services ("CMRS") carriers, even though the CMRS carriers argued that they are "jurisdictionally interstate." The court agreed with the FCC that Section 254(f) requires that "[e]very telecommunications carrier that provides intrastate telecommunications services" contribute to state universal service mechanisms. Therefore, to the extent that a carrier provides intrastate telecommunications services within the State of Nebraska, such services are subject to an NUSF surcharge, regardless of the jurisdiction in which the carrier is regulated.

IV. Responses to Questions Posed in this Investigation

Having addressed a number of relevant regulatory issues in the preceding section of these Comments, the Companies offer the following responses to the questions the Commission has posed.

Question 1: <u>Can the NUSF surcharge only be assessed on telecommunication</u> services?

Yes. Based on the preceding discussion presented in these Comments, the Companies believe that the relevant statutes, case law, regulatory rules and interpretations which authorize the Commission to assess the NUSF surcharge on telecommunications services also prohibit such assessment on services other than telecommunications services.

⁴³ *TOPUC* at 431-433.

Question 2: Can the NUSF surcharge be assessed on information services?

No. Again based on the preceding discussion, the Companies believe that the relevant statutes, case law, regulatory rules and interpretations do not allow the Commission to assess the NUSF surcharge on services that are properly characterized as information services.

Question 3: If the NUSF surcharge can only be assessed on telecommunication services, does VoIP service contain a portion or portions that is a telecommunication service subject to the NUSF surcharge?

- a. If so, what portions of which services?
- b. Who is or would be the provider of these services?
- c. Who should be required to bill, collect, and remit the NUSF surcharge?

Specific answers to these questions depend on the exact nature of the VoIP service being provided. As explained above, the Companies believe that individual VoIP calls can be characterized as intrastate. Furthermore, the Companies believe that whichever parties are providing retail intrastate telecommunications service to an end user should be subject to the NUSF surcharge, and that those parties should bill, collect and remit the surcharge to the NUSF.

Ouestion 4: Can NUSF only be assessed on intrastate services?

Yes. While neither federal nor state statutes explicitly prohibit the assessment of state USF surcharges on interstate services, the Companies believe that this Commission has already disposed of this issue by virtue of its Order entered in Application No. C-1628,⁴⁴ and adequate precedent exists that limits the Commission's assessment authority to only intrastate services.

⁴⁴ See, footnote 7 above.

If the answer to question 4 is yes, is a portion of the services used Ouestion 5: to provide VoIP an intrastate service? If so, what portions or services?

As noted above, the Companies believe that individual VoIP calls can and should be characterized as intrastate if the originating and terminating points of the call warrant such characterization, and that all retail service providers engaged in the delivery of such calls should be subject to the surcharge.

As a practical matter, because VoIP service providers have little or no incentive to record the intrastate versus interstate nature of the traffic they carry, the Companies suggest that the Commission adopt an initial revenue allocation of 28.5% interstate and 71.5% intrastate for VoIP service providers. This "safe harbor" allocation was adopted by the FCC for CMRS traffic, which has been increasingly substituted for traditional wireline interstate service. 45 The Companies believe that initial VoIP customers may use a greater proportion of interstate minutes than the average landline customer, similar to CMRS customers. 46 As in the case of the FCC's "safe harbor" for universal service contributions, VoIP service providers should have the option of reporting their actual intrastate telecommunications revenues, but must provide appropriate supporting documentation for such revenues.⁴⁷

Is VoIP subject to Neb. Rev. Stat. §§ 86-316 through 86-329 either Ouestion 6: generally or in part; and if in part, which statutory section(s) applies?

The Companies believe that, insofar as the particular VoIP service in question includes a telecommunications constitutes or service, the entire Nebraska

⁴⁵ See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, et al., Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002) at para. 21.

⁴⁶ The FCC had found that interstate wireline traffic was 15 percent of the total traffic in 1997 for purposes of the Dial Equipment Minute ("DEM") weighting program. Id. at para. 20.

⁴⁷ Id. at para. 24.

Telecommunications Universal Service Fund Act applies to such service. The Companies have previously referred to Neb. Rev. Stat. sections 86-322 through 86-324 in these Comments.

Question 7: <u>In the event VoIP services are provided by an NETC in an area that receives support, should those services, in some manner, be eligible as supported services?</u>

In Application No. NUSF-26, P.O. No. 5, the Commission indicated that:

[l]ooking to the future of universal service, it appears necessary to begin to separate the underlying physical network from the service itself. As networks continue to evolve and new technologies are deployed, the emphasis for universal service will need to shift, from directly supporting services, to supporting comparable access to services determined to be made universally available.⁴⁸

The Commission identified that the most significant difference between high and low cost areas as the cost of connecting customers to the service provider's network.⁴⁹ To identify high and low cost areas, the Commission:

... proposes to define the service provider's network at the first selective routing device that is owned, leased or otherwise used under a wholesale agreement by the telecommunications provider that will bill the customer for said services. ⁵⁰

Under this definition, the loop connecting the customer to the switch (or routing device) would constitute access to the service provider's network.⁵¹

The Companies believe that in order to be eligible to receive NUSF support, a carrier that provides VoIP services should be providing the physical connection to its network, or paying another carrier to provide the physical connection to the network

⁴⁸ See The Nebraska Public Service Commission, on its Own Motion, Seeking to Establish a Long-Term Universal Service Funding Mechanism, Application No. NUSF-26, Progression Order No. 5 ("NUSF-26, P.O. No. 5 Order") (entered June 29, 2004) at para. 31.

⁴⁹ Id. at para. 32.

⁵⁰ Ibid.

⁵¹ NUSF-26, P.O. No. 5 Order at para. 33.

(similar to competitive local exchange carriers that utilize the unbundled network element platform ("UNE-P")).⁵² Furthermore, the Companies expect that the Commission will, in its final order in Application No. NUSF-26, P.O. No. 5, issue guidelines for carriers that utilize platforms other than the incumbent local exchange carrier's to seek NUSF support; carriers providing VoIP services should comply with such guidelines in order to receive NUSF support.

V. Conclusion

The Companies believe that VoIP services clearly fit the Act's definition of "telecommunications service," that a portion of VoIP services can be properly characterized as intrastate telecommunications service, and that, consequently, the Commission indeed has authority to assess the NUSF surcharge on such intrastate VoIP services. The Companies also believe that a decision by the Commission to include VoIP services among those subject to the NUSF surcharge will promote the long-term viability of the NUSF. Such viability is essential to the Commission's ability to meet its universal service obligations. Finally, the Companies believe that NUSF support to VoIP service providers should be governed by the Commission's policy as articulated in its final order in Application No. NUSF-26, P.O. No. 5.

Dated: November 1, 2004.

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⁵² In addition, a carrier seeking to receive NUSF support must be designated as an NETC and must be in compliance with all NUSF rules.

THE RURAL INDEPENDENT **COMPANIES:**

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2004, the original and five (5) paper copies, together with an electronic copy, of the foregoing Comments were served upon Andy S. Pollock, Executive Director of the Commission, by hand delivery.

Paul M. Schudel